No. 208.
Brief for Appellee.

Office Supreme Court U. S.
FILED
MAR 5 1901
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1900.

Filed Mar. 5, 1901.

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WILSON BROTHERS, ET. AL.,
Appellants,

vs.

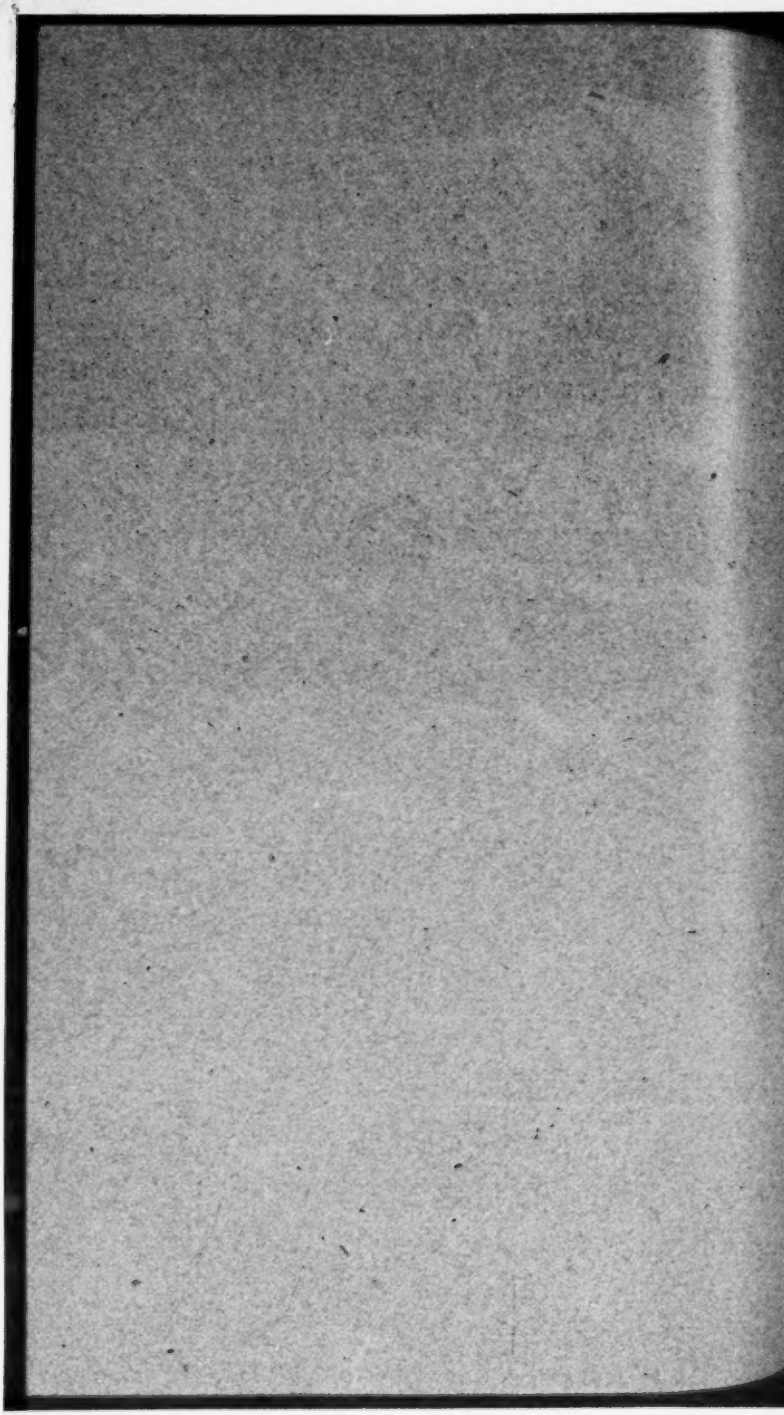
CASSIUS B. NELSON,
Appellee.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEE.

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Supreme Court of the United States.

OF OCTOBER TERM, A. D. 1900.

No. 208.

WILSON BROTHERS, ET AL.,

Appellants,

vs.

CASSIUS B. NELSON,

Appellee.

On a Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT FOR APPELLEE.

THE FACTS are clearly and fully stated in the certificate, and are few and simple.

As the original security for money loaned him Nelson gave, in 1885, his promissory note for $8,960, due in five years, with interest payable annually, and an irrevocable warrant of attorney authorizing any attorney of any court of record to confess judgment for the amount due upon the note at any time after maturity. Interest

was regularly paid until Nov. 1st, 1898. Upon this note and warrant of attorney, judgment was entered Nov'r 21st, 1898, execution issued, and his stock of goods levied upon and sold on the 15th of December following for $4,400. The judgment and levy were unassailable in law, and could not have been vacated or discharged by any legal proceedings, unless by his voluntary petition in bankruptcy. Nor had he other means sufficient to pay the judgment. Nelson had long been, in fact, insolvent, although he had continued in business. But the judgment was entered and levy made without his knowledge or consent; with no act or omission whatever on his part other than the giving of the warrant of attorney originally. The proceeding was purely an adversary one, by the creditor in the enforcement of her security.

The three questions certified for advice are:

1. Whether the said Cassius B. Nelson, by failure to file his voluntary petition in bankruptcy before the sale under such levy, and to procure thereon an adjudication of bankruptcy, or by his failure to pay and discharge the judgment before the sale under such levy, committed an act of bankruptcy within the meaning of sec. 3*a*, subdivision (3) of the bankrupt act, 30 Stat., chap. 541.

2. Whether the judgment so entered and the levy of the execution thereon was a preference "suffered" or "permitted" by the said Nelson within the meaning of clause (3) of sec. 3*a* of the bankrupt law.

3. Whether the failure of Nelson to vacate and discharge the preference so obtained, if it was one, at least five days before the execution sale, was an act of bankruptcy.

Two principles, both seemingly plain in law and reason, should govern, it is respectfully submitted, response to these questions:

1. ONE OUGHT NOT TO BE HELD GUILTY OF COMMITTING AN ACT OF BANKRUPTCY BECAUSE OF THE ACT OF ANOTHER DONE WITHOUT HIS KNOWLEDGE AND IN A HOSTILE PROCEEDING.

2. ONE OUGHT NOT TO BE HELD GUILTY OF COMMITTING AN ACT OF BANKRUPTCY BECAUSE HE DECLINES THE PRIVILEGE OF VOLUNTARILY BECOMING BANKRUPT.

A statute which denounced such a consequence in either case, would be oppressive and unjust. To construe a statute, which does not enact such consequences in explicit terms, so as to impose them by interpretation, seems juridically inconceivable.

The argument for the appellant seems to concede the first of these propositions, and to found its hope upon the second, yet asks an affirmative answer to all three questions. We contend that neither upon the fair meaning of the words employed by congress, nor upon just principles applicable to the legislation under consideration, can either consequence be inflicted.

I.

THE JUDGMENT AND LEVY WERE NOT A "PREFERENCE," NOR "SUFFERED OR PERMITTED" BY NELSON, THE APPELLEE.

Wilson v. City Bank, 17 Wall. 473.
Clark v. Iselin, 21 id. 360.
National Bank v. Warren, 96 U. S. 539.
McCaul v. Thayer 70 Ohio 138
Bank v. Shrenk 97 id 250

1. The word *preference*, as used in the statute, is a technical noun of the law, the meaning of which is well established and easy to reach. It implies a disposition of his property by an insolvent, or one in contemplation of insolvency, either through his own act or his conscious and purposed contribution to the act of a creditor, by which the particular creditor is given an advantage over other creditors. A preferred creditor is one whom *the debtor* has preferred, and his advantage is derived from *the debtor*, when contemplating general insolvency. A creditor is not preferred, who stipulates for security with the origination of the debt, although he thus assures himself advantage over other creditors, not secured, in case of the debtor's subsequent insolvency. Such a security, embraced in the original contract, is sacred in the law against violation or impairment.

Neither is a creditor preferred who, in adversary proceedings, avails himself against his delinquent debtor of the remedy which the law gives him, although by his diligence he thus secures an advantage which other

creditors not so active in their own interests, may not enjoy. His advantage is not the debtor's favor or act, but the gift of the law, whose aid he has rightfully invoked.

The meaning of the term is most readily seen from its use in the common law, which upheld preferences. Then, when lawful, the preferential acts of the debtor were unequivocal. He *intended* to give, and gave, specific advantages to favored creditors, and "preferences" and "preferred creditors" required no elucidation.

The meaning of preference, as used in the statute, remains the same; but since the thing is now forbidden, and yet is often collusively attempted, provision is made to discover and defeat the preferential purpose, even though skillfully concealed, especially when under the favorite guise of adverse, but in truth collusive, legal proceedings.

"A person shall be deemed to have given a preference if being insolvent, he has *procured or suffered* a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same ciass." §60, Bankrupt Act.

Here is the bankrupt act of 1867, in substance, with the rule enacted in terms that one must have intended the natural consequences of his intelligent acts, as a substitute for the phrase "with intent (or view) to give a preference." Nothing more.

To give a *preference* by judgment is none the less still the act of *the debtor*. To have procured it, imports that

he has taken actively some promotive step to obtain the the judgment. And what to suffer it? Necessarily some act, or some omission, equally intelligent, but rather of collusive submission than original promotion. To procure implies initiative by the debtor; to suffer, initiative by the creditor, but in either case, understanding of the steps taken to obtain the judgment, with conscious purpose on the part of the debtor. Desire might incite to procurement, willingness only induce sufferance; but the volition of the debtor, conscious, intelligent volition, is as essential to a preference in the one case as the other. And in the case of sufferance, it would seem also clear that this volition must have caused the debtor to refrain from doing something, which he might but for his willingness have otherwise done to prevent the result. It would be denial to a creditor of his legal right, not less than unjust imputation on the debtor, to hold him guilty of suffering what he could in no way resist.

The entry of judgment is, in no such case, imputable to the debtor.

See discussion in *Clark v. Iselin*, 21 Wall. 373-77.

2. There seems confusion of language and ideas between sec. 3*a*, subdivision (3), and sec. 60, of the Bankrupt Act; as well as in other parts of it.

The former requires that the debtor, in order to be guilty of an act of bankruptcy, must have *suffered or permitted* a *preference* and through *legal proceedings*. The latter defines the preference as a *judgment, procured or suffered*.

It must be then to have suffered or permitted the *judgment*, which constitutes the first step in the act of bankruptcy, since that is the particular legal proceeding which alone amounts to a preference.

Literally, pursuing the language of the statute, Nelson must have "suffered or permitted" his creditor to obtain a judgment which Nelson "procured or suffered" to be entered against himself.

The word "permit" implies somewhat more of active volition than the word "suffer." See distinction of synonyms in Webster's International Dictionary under *Permit*; and in the Century Dictionary under *Allow*. Unquestionably it in no manner extends the idea of a passive exercise of will, imported by the word "suffer." The act of 1898 goes no further, therefore, in this particular, than the act of 1867, in which "suffer" was the alternative verb employed to signify the character of the debtor's contribution to the preferential act and purpose; as it is here. In fact, in this act as in the earlier, "suffer" is collocated with procure; and thus, in both, the obvious meaning is carried, and plainly intended to be carried, of *the debtor's* conscious participation in the act by which the creditor secures his preference, and as well in the preferential purpose; in the one case by active promotion, in the other, by intelligent and contributive submission. The preference now, as ever, is *the debtor's* preference of the favored creditor over others.

Notwithstanding, therefore, that Congress has in the act of 1898 substituted the rule of effect for proof of *intent*, as an independent fact necessary to a fraudulent preference, under the act of 1867, there is not a word which diminishes the necessity now of showing,

in order to make out a preference, that the debtor is chargeable with *conscious* participation, although passive, in the proceedings resulting in judgment: with *intelligent volition* that it be entered against him.

No warrant lies in the statute for the monstrous proposition that one may be adjudged guilty of an act done by others without his knowledge, and of course without his participation or consent; that he may be held liable to the infliction of harmful consequences as if he had himself preferred a creditor, whose every act was, in truth, taken in hostility to him and, on his part, in utter ignorance of it, until complete.

The true purpose of Congress is made even more clear by the language employed in defining the second act of bankruptcy, which is the transfer of property "to one or more of his creditors *with intent to prefer* such creditors over his other creditors." Thus to give to a completed transfer the prohibited preferential character, proof of *intent to prefer* is explicitly made essential. But in the case of a preferential judgment, by which the creditor and debtor may more easily collude and hide the preferential purpose, the intent is left to stand only on the presumption from effect, when the debtor procures or suffers it to be entered; although the like presumption may also be drawn in case of a transfer. Yet it is obvious that the creditor gains no more, and the debtor's estate suffers no less, whether the preference be effected in one manner or the other. And can it be supposed that Congress meant that in one case there should be necessary a provable intent to prefer, but that in the other an absolute want of any knowledge of the transaction on

the part of the debtor should be enough? And yet that both should be characterized as *preferences by the debtor*, and, as such, acts of bankruptcy committed by him? Can there be doubt that the true meaning of the act is that in either form of giving a preference the debtor must intelligently participate?

The point must be deemed settled by the former judgments of this Court. In *National Bank v. Warren, supra*, the opinion began: "This action goes upon the theory that the mere non-resistance of a debtor to judicial proceedings against him, when the debt is due and there is no valid defense to it, is the suffering and giving a preference under the Bankrupt Act. This theory is expressly repudiated in the case of Wilson v. City Bank."

If not a sufferance when cognizant of the proceeding though helpless to resist, how much more plainly is it not, when the debtor is in entire ignorance of the hostile action, not only begun but consummated by his creditor before he receives intelligence of it?

3. Mrs. Johnstone did not become a preferred creditor, nor her judgment a preference, because she appealed to the law for the aid it proffered her to collect her just debt. The warrant of attorney, irrevocable by its terms, was a security for which she stipulated when she loaned her money. When did it lose its power, the power given by the law? To what other tribunal could she appeal, in what other manner invoke the aid of public law, for the restoration of her money? What provision in the Bankrupt Act deprived her of the remedy she pursued; what offered her any other?

It is enough to quote the language of this court, in a like case; *Clark v. Iselin*, 21 Wall. 373.

"The confession was not itself a judgment, but it authorized the defendants to cause a judgment to be entered without the knowledge of the debtors, and even against their protest. Was, then, the subsequent entry of the judgment, and the issuing of an execution thereon, followed by a levy on the debtor's goods, obtaining an unlawful preference? The court below thought it was, but such is not our opinion. It must be conceded that on the 30th day of April, when the defendants caused the judgment to be entered, the execution to issue, and the levy to be made, they knew that Dibblee & Co. were insolvent; but that knowledge is not of itself sufficient to invalidate the judgment and execution. A creditor may pursue his insolvent debtor to judgment and execution, with full knowledge of the insolvency, notwithstanding the provisions of the Bankrupt Act, provided the debtor does nothing to aid the pursuit. If there be no collusion between the debtor and the creditor, the ordinary remedies of the law are open to the latter." "In fine, there must be guilty collusion to constitute the fraudulent preference condemned by the statute." P. 375.

There is nothing in the present act which any more than the former deprives the creditor of "the ordinary remedies of the law" when in pursuit of a lawful end against his debtor, without guilty collusion; or which makes a judgment obtained in such pursuit a preference; nothing, in short, which qualifies the force of the opinion quoted so aptly to the point now in discussion.

And there it may be left. Indeed, counsel for appellants substantially, if not explicitly, concede this point of our brief; it is hoped, the argument shows advisedly.

II.

IT IS NOT AN ACT OF BANKRUPTCY BY AN INSOLVENT TO REFRAIN FROM VOLUNTARY BANKRUPTCY.

1. The statute itself, when correctly analysed, demonstrates the unsoundness of the contention to the contrary.

The learned counsel for the appellants, recognizing the soundness of the preceding views, begin their argument, after quoting from the opinion of District Judge BUNN, by this explicit statement: (pp. 6–7)

"The act of bankruptcy complained of is not the *entry of judgment*, but Nelson's failure to *vacate or discharge the execution*. This could have been accomplished in either of two ways, by payment, or by filing a voluntary petition in bankruptcy. The second method was easily within his power. His failure to use it authorized the court to adjudicate him a bankrupt upon the petition of creditors, and thus avoid the preference. It was not the entry of judgment, but the suffering of the sale under the execution, that established the preference." And see also their summary, pp. 16–17.

This theory loses sight of the statute in many particulars. As already shown, the statute confines a preference through legal proceedings to the procuring or suffering of a *judgment* alone. There is nothing in it such as the act of 1867 contained, in relation to his procuring or suffering "his property to be taken on le-

gal process," or "any part of his property to be attached, sequestered or *seized on execution*." It would, perhaps, aid appellants little if the statute went further, since in this case the levy, as well as judgment, was equally without Nelson's knowledge; as, indeed, their argument recognizes. But it is important to keep the exact limitations of the statute in view, in order to its correct interpretation.

This argument of appellants fails also to take cognizance of the definition prescribed of the act of bankruptcy under consideration.

The words are: The act of bankruptcy consists of having "(3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference."

The statute does not make the insolvent guilty of an act of bankruptcy because he has failed to vacate or discharge any or every judgment against him, at least five days before a sale, etc. He must have been guilty of two sins, or of one sin and one default, to be within its terms. First, he must have suffered a *preferential* judgment to be entered against him; AND, secondly, must have failed to have "vacated or discharged such preference."

Obviously, therefore, if the judgment obtained against him were not a *preference*, he commits no act of bankruptcy by failing to vacate or discharge it; and if it be conceded that Nelson, by filing a voluntary petition, could have vacated the judgment of Mrs. Johnstone, [which is strenuously disputed] he cannot be held to

have committed an act of bankruptcy because he did not, since the judgment was not a preference. Counsel argue that his refusal to file a petition operated to give this judgment preferential effect, and they would thus supply, by relation or retroaction, the quality of purposed sufferance necessary to constitute the judgment a preference. But, manifestly, this confounds the statute; for it requires the Court to impute to the second sin necessary to the act of bankruptcy, when the first is wanting, all the consequences of both. When no preferential judgment exists, no duty to vacate arises; and to hold that non-performance, where no duty to perform exists, both operates to raise the duty and proves its breach, seems justly characterizable as a refinement of casuistry.

The fair, reasonable meaning of the statute, we respectfully submit, imputes the act of bankruptcy primarily to the *preference* which the debtor has given, rather than to his failure to vacate it; the latter being seemingly intended as an avenue of escape proffered to him from the bankruptcy otherwise consequent on having given a preference. It should be read, in just intendment, that to suffer a preferential judgment to be entered against him is an act of bankruptcy by an insolvent, which his creditors can avail themselves of, unless he shall protect them from its consequences by causing it to be vacated or discharged; the statute presuming that what he has caused he can in some way control. And it seems mere confusion of the statutory purpose, to maintain that the chief stress of the enactment lies in the second clause; the failure to withdraw the preference, rather than the sin of giving it. Still more inadmissible, that so fierce was the purpose of Congress in the second clause, that the failure to vacate or discharge a judgment which was hostilely obtained,

and in no wise preferential, is to operate both to impute the preferential character to it and to complete the second step of the act of bankruptcy; in short, to constitute in itself the entire sin for which involuntary bankruptcy may be adjudged, notwithstanding the explicit requirement of a preceding preference.

In illustration of the foregoing view, though not otherwise important to the point immediately under discussion, we are forced to question the correctness of the learned counsel for appellants in their proposed alternative method of an insolvent's escape from the consequences of a preferential judgment; by its payment. If an insolvent procure a judgment against himself in the purpose to give preference to a creditor, it would rather seem to confirm the preference to pay it; and although in one sense payment discharges a judgment, the statute has seemingly used the verb "discharged" in another sense, indicated by its collocation with "vacated;" implying that to escape the consequences of his having thus attempted to prefer his favored creditor, he must cause the judgment to be so "vacated or discharged" as to take from it the effect of benefiting that creditor; upon the assumption already suggested that the debtor must be able to control, in some way, the judgment he has procured or suffered to be entered against him. Payment of a preferential judgment would hardly be less than a transfer of property with intent to prefer the creditor, and thus of itself an act of bankruptcy under the second clause.

But in this case, Nelson could not pay, and did not attempt it; and the foregoing suggestion is now impor-

tant only as contributing to show the true meaning of the default which Congress has said shall constitute the second step in the act of bankruptcy here alleged.

This reasoning demonstrates from the statute itself, it is respectfully submitted, that it could not have been the purpose of Congress to make the debtor's refraining to file a voluntary petition an act of bankruptcy, upon which he should be adjudged involuntarily bankrupt. For, if the judgment were not a *preference*, the act imposes no duty on him to vacate or discharge it: and, if it were a preference, it must be because of collusion between creditor and debtor, in which case the debtor is presumed able to recall it, by causing the creditor to vacate the judgment; it being clear of course that the creditor can gain nothing by refusing it, because the judgment will be of no advantage to him, having been obtained by collusion; and therefore his failure to vacate it will complete the act of bankruptcy.

The "guilty collusion" necessary to a preference being proven, the power to vacate the judgment *must* exist between the colluding parties, and if not exerted, each takes the consequence befitting him, the debtor bankruptcy, the creditor loss of preference.

No necessity exists in such a case, for the debtor's voluntary petition, in order to his adjudication.

It will be seen also that this brings the definition of the third act of bankruptcy into harmony with the second, which is the *transfer* of property "*with intent to prefer.*" In that case, the preferential act has been finished by the transfer made, and the act of bankruptcy

is complete. In the third, the preferential act, though equally intended, has only been begun, and a *locus penitentiae* is given the insolvent whereby he may retrieve the false step, and thus, escaping bankruptcy, pursue such attempts as may be open to him, through the forbearance of creditors or otherwise, to restore his fortunes or himself administer his estate to a better advantage for his creditors' benefit, as well as his own.

2. It ought to be sufficient to demonstrate that Congress did not intend the failure to file a voluntary petition to constitute an act of bankruptcy, to observe that they have omitted so to provide. It would seem inadmissible to import into the statute an act of bankruptcy, which was not explicitly mentioned and defined. One cannot read the Act without recognition of the manifest intention of the legislature to be exact and particular in prescription of the offenses, or grounds, upon which the quasi-punitive judgment may be pronounced which not only inflicts the stigma of a bankrupt upon a resisting defendant, but withdraws from him all power to administer his estate himself. Especially ought this consideration to have weight, because of the history of the act of 1867, under which the same contention now presented was raised, upon similar reasoning, and this court held it repeatedly to be unwarranted. Legislation of this character ought not to be extended by implication, because, like acts imposing penalties in new cases, it deprives the citizen of rights which he otherwise possessed under the laws; and, though the remedial purposes of the act should be rather aided than straitened by inter-

pretation, this can be rightfully done only in the cases prescribed for its application.

Collyer on Bankruptcy, 3rd Ed. 23.

In re Empire Metallic Bedstead Co., 39 C. C. A. 372.

And the act itself shows the consideration of congress for those who may be unwilling to be judicially denounced as bankrupts, and the obvious intention that insolvency, however great, should not authorize such a judgment; for the fifth ground for the adjudication is, in terms, that the insolvent shall have "admitted in writing his inability to pay his debts *and his willingness to be adjudged a bankrupt on that ground*." The argument of the counsel for appellants is, that he shall be adjudged bankrupt because he is *not* willing to be so adjudged. The mere additional fact that a judgment has been entered against him gives no force to their contention, when entered in hostility to him and without his knowledge; because such a judgment is but a form of indebtedness beyond his control, and if congress had intended that to be an element in the case, it would have so declared it; a more forcible consideration since they have so declared in respect to any judgment to the entry of which he has given preferential aid.

3. It is the favorite argument of those who wish to find in a statute what the legislature has not enacted, to assert the "policy" of the legislature and ask the court to supply its failures to give that policy effect. So some district judges and officers have declared the "policy" of Congress in the act of 1898, to be to secure

to an insolvent's creditors the equal distribution of his estate among them. Similar argument was pressed upon this court to support the like contention under the act of 1867. But this court, pursuing no "policy" beyond the fair meaning of the language of the statute, arrived at conclusions which are even more strongly supportable, by the same reasoning, upon the act of 1898.

It distinguished first the provisions relating to voluntary bankruptcy from those relating only to involuntary bankruptcy, and held the "discrimination made by the act" between these cases "the first and most important consideration" demanding attention. 17 Wall. 480. In the former, the insolvent himself turns over his estate, seeking only for himself a discharge from his debts. In the latter, judgment is sought *in invitum*, and it was said: "But when a person claims to take from another all control of his property, to arrest him in the exercise of his occupation, and to impair his standing as a business man, in short to place him in a position which may ruin him in the midst of a prosperous career, the precise circumstances or facts on which he is authorized to do this, should not only be *well defined in the law*, but *clearly established* in the court." It is well known to the court that any legislation permitting involuntary bankruptcy was with difficulty secured in the act of 1898, which first passed the Senate without such provisions, and that they were finally written in by the conference committee, and, though it be true that the debates and steps by which an act is passed are of little or no value to assist its interpretation, yet this history of the passage of the present act adds emphasis to the reasoning of the court upon the act of 1867, in its present application. Its

applicability also is strengthened, and the purpose of Congress to insist upon like ideas now clearly exhibited, by the language already referred to as defining the fifth act of bankruptcy, the *written* declaration of the insolvent's willingness.

This court next disposed of the argument, which had "received the assent of a large number of the district judges" that the failure of the debtor to file a petition established the preferential character of the judgment obtained against him, that the "grand feature" of the law was to secure equal distribution in all cases of insolvency, and hence it was the insolvent's legal duty to file a voluntary petition; by holding there was neither such moral duty, nor statatory duty; that it was the insolvent's right, which the construction claimed might often change from a privilege to a ruinous duty; that the contention, if sustained, would create another class of cases in favor of creditors, by inference, "where the debtor ought himself to go into court as a bankrupt and fails to do it;" and, finally, that it was an erroneous assumption that the law intended to cover *all cases* of insolvency, and the construction sought could "only be sustained by imputing to the general scope of the Bankrupt Act a harsh and illiberal purpose, at variance with its true spirit and with the policy which prompted its enactment." 17 Wall, 483—88.

Every feature of this sound reasoning, it needs no discussion to see, is equally applicable to the present act; but in some points with greater force. Especially that the act was not intended to extend to all cases of insolvency. Under the act of 1867, many and various acts of a debtor were defined as acts of bankruptcy, and if engaged in the principal avocations of business, the mere suspension of payment of commercial paper

for fourteen days was sufficient for adjudication. The present act allows practically but two causes as sufficient to warrant the adjudication against an unwilling insolvent, since one who has made a general assignment may be called willing, having divested himself voluntarily of his estate; and these two are, first, the disposition of his property in fraud of creditors, and, secondly, the giving a preference; the latter in two aspects, either as actually complete, or as attempted by a judgment and not recalled by its vacation.

If then, the argument from supposed "policy" was untenable under the act of 1867, by how much less is it worthy of consideration now? For Congress has not only more unmistakably marked the difference between voluntary and involuntary bankruptcy, but has very greatly enlarged the number of cases of insolvency in which creditors cannot proceed *in invitum*; cases in which this act, much more than the former, omits to "forbid all proceedings to collect debts in other courts, and in all other modes than by bankruptcy." 17 Wall. 485. In short, the policy of equal distribution was designed not for cases of insolvency but for cases of bankruptcy, not to be the law for governing the conduct of all insolvents, but only to control the administration of estates in the court of bankruptcy; and the estates of all insolvents, not by their own petition or upon proper adjudication brought within the jurisdiction of that court, remain subject to the operation of the laws, and the authority of courts, not relating to bankruptcy.

4 It is essential to the theory of appellants that the voluntary petition of an insolvent must have the effect

to vacate or discharge any and every judgment, although not preferential, entered within the four months previous. In any case when it will not, the debtor cannot be guilty of a default in not filing it, for which bankruptcy is denounced.

This essential appellants' counsel assume, by their summary statement that it was thus within Nelson's power to have vacated or discharged *the execution;* basing it on the doctrine held *In re Richards*, 37 C. C. A. 634; 96 Fed. 935, S. C.; that subdivision *c* of sec. 67 of the act is entirely extinguished by subdivision *f*, because of irreconcilable repugnancy between the two subdivisions, and the supremacy of the latter as the latest expression of legislative power.

At a later stage of the argument, attention will be briefly drawn to this question, and the proposition submitted that subdivision *c* is not so extinguished or repealed, but governs in all cases of voluntary bankruptcy. At this point, that will be assumed; and the following observations submitted upon that assumption.

If that be correct, the appellants' view of an insolvent's duty is clearly insupportable.

In the first place there is not a line or word in the bankrupt act that vacates or discharges, or authorizes to be vacated or discharged, any judgment in any other court, lawfully entered before bankruptcy in a hostile proceeding against the bankrupt without his procurement or sufferance. Counsel point out none, and offer no argument that any such power exists in the court of bankruptcy, or that any such consequence must be given in the court which rendered the judgment, by reason of the bankruptcy. Their claim assumes only that *the lien of the execution* levied upon personal property will be so dissolved. But were that

correctly assumed, it would not satisfy the statute, which is that the preferential *judgment* shall be vacated or discharged by the preferring or colluding debtor.

In the next place, the statute is very far from declaring that *all* execution liens shall be dissolved by the filing of a petition. (Counsel have twice misquoted it in their brief, p. 4 and p. 10, by inadvertence, having used the disjunctive "or" in place of the conjunctive "and.")

It declares only that liens "created by or obtained in or pursuant to any suit or proceeding at law or in equity, *including* an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy" which are impeachable upon one of three grounds of attack, shall be so dissolved. Sec. 67, subdivision *e*.

It will be noted, also, that no peculiar denunciation is aimed at judgments *by confession*, but only that they are included with judgments in any other manner obtained.

The three grounds upon which liens acquired by judgment may be dissolved, when proven to exist, are "(1) that said lien was obtained *and permitted*, while the defendant was insolvent *and* (not "or" as misquoted) that its existence and enforcement will work a preference, or, (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent *and in contemplation of bankruptcy*, or, (3) that such lien was *sought* and *permitted* in fraud of the provisions of this act."

The act of 1898 is not remarkably happy in the perspicacity of its language; but there seems little doubt

what these clauses must mean, especially, when read with other sections *in pari materia*. In the first clause, reference is undoubtedly made to the definition of the third act of bankruptcy in section 3 and of a preference in section 60, and the provision means that liens by *preferential* judgments shall be dissolved. Of the third clause, it is difficult to assign any other meaning, also; for it is not apparent how a lien could be, by a suit at law or in equity, "sought and permitted", that is to say, by collusion between creditor and debtor, which would be peculiarly "in fraud of the provisions of this act", except to give the creditor advantage in the nature of a preference. The second clause requires specific proof of the judgment creditor's reasonable cause to believe, etc., a fact to be independently found.

But, however, to be interpreted, these clauses clearly require, besides the fact of a judgment and execution levied, proof of additional facts chargeable upon the judgment creditor, in order to dissolve the lien he has obtained; and, of course, they must be established in a proceeding to which he shall be party and in which he shall be heard. It not only follows, therefore, that the filing of a voluntary petition will not dissolve all execution liens, but that it will dissolve none without a judicial inquiry in which the rights of another than the insolvent must be adjudged; in which such other must participate.

In such only, therefore, would it avail for the insolvent to file a petition; in such only, can it be justly said, upon appellants' own theory, that a duty to file it exists, the failure in which constitutes an act of bankruptcy.

The general rule which the appellants ask the court

to establish ought, therefore, to be so limited that the insolvent's failure to file a voluntary petition five days before the execution sale, shall be an act of bankruptcy in those cases *only* in which the court shall predetermine that upon a subsequent inquiry against the judgment creditor it will convict the latter of such complicity as shall cause the dissolution of the lien. To adjudge the insolvent guilty of this act of involuntary bankruptcy must, in every case, be done at the risk that if the judgment creditor shall, on inquiry against him, show that he is not within either of the three cases in which his lien may be dissolved, the adjudication will turn out to have been unjust. Further, it cannot but operate to prejudge, in some degree, the question to be afterwards tried when the judgment creditor shall be made a party to the inquiry against him; an obviously vicious method of judicial procedure.

This consequence attaches, of course, only when no case is made against the insolvent, as in the cause at bar, showing *him* to have committed any of the acts of bankruptcy defined by the statute. They relate to and illustrate the theory of appellants that when the insolvent has *not* procured or suffered a preferential judgment, when he has become a judgment debtor without his own knowledge but by the hostile act of a creditor, he may be made an involuntary bankrupt because he is *not* willing to become a bankrupt.

5. Nothing in the facts stated in the certificate warrants the assumption of appellants' counsel that Nelson could have vacated or discharged the judgment of Mrs. Johnstone, or even have caused the lien of her

execution to be dissolved, by filing his voluntary petition. Neither of the conditions specified in the statute for the dissolution of such a lien is shown by the certificate to be applicable to her lien.

It has been sufficiently argued that she obtained her judgment and levied her execution by a legitimate appeal to the only law or method of procedure open to her, in a hostile proceeding against her debtor, without his knowledge, procurement or sufferance. It was neither a permitted preference, nor was it sought or permitted in fraud of the provisions of the act. Nor does the certificate either contain direct statement or warrant just inference that she had reasonable cause to believe Nelson to be "insolvent and in contemplation of bankruptcy." Her resort to her security, given when she loaned her money, proves no knowledge of such facts as would charge her with reasonable cause to believe him insolvent, he then still continuing in business. And although the fact of insolvency is now known, the debtor was then assuredly not "in contemplation of bankruptcy." The meaning of that phrase is settled. "To render the security void, the debtor must have contemplated *an act of bankruptcy, or an application by himself to be decreed a bankrupt.*" *Buckingham vs. McLean*, 13 How. 167. The facts stated in the certificate negative the existence then of any such contemplation by Nelson. It is, indeed, the absence of such contemplation that the appellants complain of.

From these conclusions there seems no legitimate escape, if the rules prescribed by subdivision *c*, of sec. 67 are to prevail. For, in such case, it could have availed nothing for Nelson to file a voluntary petition.

The property levied on was then in custody of the sheriff. To recover it, or the proceeds of its sale, a suit

by the trustee would be necessary. *Bardes v. Hawarden Bank*, 178 U. S. 524. Upon the facts shown by the certificate, judgment must have gone for the defendant. The state court had proceeded according to law; nor could it refuse to the execution creditor the results obtained, or in awarding them be said to deny any right given by the law of the United States.

6. If sec. 67 be interpreted by its own terms there is seemingly no irreconcilable repugnancy between subdivisions *e* and *f*.

The former explicitly relates to a case in bankruptcy on petition filed "by or against" the bankrupt; the latter just as explicitly to a case on petition filed "against him"; and though some confusion may thus arise as to cases of involuntary bankruptcy, there seems in this no sufficient justification for expurgating from the statute an entire subdivision which Congress as surely enacted as it enacted the other; a conclusion in violation of that paramount canon of construction which requires the reconciliation of such differences wherever in any wise possible.

The argument from the first definition of phrases in section one seems not reasonably sufficient to overthrow the conclusion which must thus be reached by reading section 67 independently; because, first, the phrase defined is different, indicating only the person of the bankrupt by whichever initiation so adjudged, and, therefore neither applicable in terms, nor as a definition for mere convenience justly to be extended to other cases; and, secondly, the direct antithesis of phrases between subdivisions *e* and *f* in the section as written would seem

more likely to have been in the immediate contemplation of the legislature at the time than the supposed idea underlying a definition of such character, in a section not then in controversy, of a phrase which does not embrace the subject that is thus sought to be governed by it. The history of the preparation of this section by a conference committee tends still more to the supposition that the attention of the committee was limited to the section, rather than that it was purposed so to destroy a substantive subdivision intentionally retained as if comportable.

Arguments from supposed consequences are to be given, justly, but little weight in reading a statute; for it is not difficult to construct them on either side, and it is the wisdom of the legislature, such as it is, which rightfully controls. And it would seem more consonant with sound principles, when it becomes necessary to deal with a statute so hastily and unsatisfactorily written as this, rather to restrain its destructive effects than to suppose Congress intended to uproot by it all the vested rights which attach to judicial proceedings conducted honestly, without collusion, according to the law governing the matter than before the duly constituted courts of the land.

The reasoning of the opinion *In re O'Connor*, 95 Fed. 943, is worthy of careful attention, as giving effect to the rules of statutory construction long established and well grounded.

These suggestions are submitted with great deference, and without protracted discussion, inasmuch as the subject may be disregarded in the disposition of the

questions certified. For, as was well said by the learned and able circuit judge who wrote the opinion *In re Richards*, when speaking of the lien claimed upon a like judgment: "It is doubtless true that the debtor could not have been forced into bankruptcy because of the acts done by him."

And whatever may be the rule as to liens, it is here confidently submitted that this debtor, the appellee, ought not to be forced into bankruptcy for acts not done by him, but done against him; nor for his unwillingness to be stigmatized a bankrupt when he had committed no act of bankruptcy.

No review of adjudged cases is thought likely to be of any utility to the court. Those decided under the present act have been collated by counsel for appellants. There is but little discussion in them and the *ipse dixit* of any judicial officer requires no comment here.

Unless this Act of 1898, instead of being less grasping and severe than the Act of 1867, as is commonly understood to have been its purpose, shall be found to have proceeded on more trenchant and destructive ideas, the case is predetermined by the adjudications of this tribunal. That those adjudications are not less applicable

now than formerly, either upon attentive examination of the letter of the law, or a consideration of its purposes with similar breadth of wisdom, is confidently and respectfully submitted.

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